

SALVAGE, TOWAGE AND ENVIRONMENTAL DAMAGE FROM A COASTGUARD PERSPECTIVE



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1 Introduction

1.1 Topic and hypothesis

The topic for the thesis is within maritime law, public law and private law.

Every year Norwegian Coastguard vessels are involved in different salvage, towage and environmental operations. The Coastguard takes pride in trying to create a safer life for everyone who is present at sea. This is also reflected in the Norwegian coastguards motto “always present”¹, as this indicates the being present at the all times as a execution of sovereign rights, authority execution and also safety measures towards rescue operation. This thesis will explore if there are special rules that apply when the Coastguard are involved in salvage, towage or environmental damage operations, and find out which rules are different for the Coastguard than for other vessels. This process has however shown that in some cases the fact that the Coastguard is involved will create no special considerations. Therefore part of the discussion will be of general interest.

The three topics for the thesis are closely connected. Towage and environmental damage operation may be a part of a salvage operation. They can also be done own its own.

After successful salvage operations the salvor usually claims a salvage award. This is then meant to be an incentive for the salvors, and also a compensation for damages that might occur. The coastguard does not under normal circumstances claim for a salvage award. This is because it is considered to be a part of the duty imposed on the coastguard and its personnel to perform rescue operations. These rescue operations have a main goal to save persons in danger and only as a secondary goal to save material.

¹ Translated from Norwegian: “Alltid tilstede”

An important part of those operations are towage operations, so a major part of this thesis will deal with towage.

In certain rescue operations pollution will be an issue, and may have disastrous effects. For instance oil pollution may have devastating effect on the environment and the coastal communities. The Coastguard has been present at all major ship pollution disasters in recent time, and it is also fair to say that this is not going to change.

1.2 Limitation of the thesis

The thesis is limited to Norwegian jurisdiction. So coastguard, acts, etc all relates to the Norwegian ones.

Although this thesis is written from a coastguard perspective, large parts will also be relevant to Navy vessels and other state owned vessels. Parts of this thesis will only be about Coastguards vessels. Among others does the Norwegian Coastguard Act only regulate the coastguard, and not other state owned vessels. So the duties laid down in the Act only apply to coastguard personnel and not other state employed seamen.

1.3 Definitions

With State owned vessel is meant a vessel owned by the state and only used for non-commercial activities.

With the term environmental damage operation is understood those operations done to limit or prevent environmental damage from a specific ship or source. Those operations that prevent damage in a more general way are outside the term.

1.4 Legal sources

1.4.1 Statutes and contracts

To examine relevant statutes are the first step in solving a legal issue. For this thesis one statute is the most important, the Norwegian Maritime Code (NMC). NMC governs parts of all three subjects, and is therefore of central importance to this thesis. Some parts of this thesis will also be subject to general Norwegian tort law, and the Tort Act will also be relevant. As this thesis focus on special considerations for the Coastguard, the Coastguard Act will also be of relevance.

The Norwegian Marine Insurance Plan will be the governing tool for the insurance part. For the P&I insurances each club has its own statutes and rules. This will not be examined in detail.

International Conventions governs both salvage law and a major part of environmental law. The Salvage Convention of 1989 is central to salvage law. It is incorporated into Norwegian law in NMC chapter 16. In environmental law two conventions are central. The CLC Convention concerning oil pollution for tankers and the Bunker Convention concerning oil pollution from other vessels. These two conventions are incorporated into Norwegian law in NMC chapter 10.

Preparatory works to both national acts and international conventions are relevant in understanding the meaning of the texts. Also preparatory texts to previous versions of the act may be relevant. Preparatory works are used in this thesis.

Although statutes in some areas are the primary source of law, parties also enjoy a great part of freedom in deciding the rules. Contracts are then used to govern the relationship between the parties. Standardised contracts are set up by independent organisations (BIMCO etc), by trade associations or by individual companies. These types of contracts are used in large part of the business world, and it is therefore also important to examine

those contracts to understand the rules, which govern situations in which they are used. For this thesis there are standard contracts for both salvage and towage.

The Coastguard has several chartered vessel. The charter parties have not been available during the writing process. Part of a charter party used by the Coastguard has however been available through the Norwegian Coastal Administrations homepage, and this has been used as a substitute. As the Coastguard charters several vessels, this may not be accurate for all of them.

1.4.2 Judgments and Decisions

As this thesis focus on the Norwegian perspective, Scandinavian judgement will be most relevant. Also English judgement will be used as a comparison to the Norwegian/Scandinavian solution. Also other cases will be used. The cases will be discussed in the thesis.

1.4.3 Legal Literature

Legal literature is essential for the complete understanding the law. Legal literature has been used all through the thesis to widen the horizon of understanding. Several texts of legal literature are used, and are referred to in the thesis. Three texts are though of special importance. For all three subjects Falkanger, Bull and Brautaset's work on Scandinavian maritime law is central. This work describes almost all aspects of maritime law and is essential also in this thesis. Sjur Brækhus' work *Bergning* and his contribution to *Festskrift till Jan Hellner* are essential to the chapter on salvage. For the English perspective Kennedy and Rose's *Law of salvage* is used.

1.5 Method

Ordinary legal method is used.

1.6 The Norwegian Coastguard

The Norwegian coastguard is organised under the Norwegian Defence Department. It is a part of the Norwegian Armed forces. The Coastguard make up the Norwegian armed sea forces together with the Navy. The Coastguard is organised in two squadrons, one in the north and one in the south. The Coastguard Squadron North is located in Sortland. Its counterpart in the south is located at Haakonsvern just outside Bergen. These two squadrons make up the Coastguard together with the Chief of Coastguard and his staff in Oslo and the Coastguard education centre also at Haakonsvern. The southern squadron has a area of responsibility south of 65 degrees north, and the northern squadron is responsible for the area north of 65 degrees north. The Coastguard squadron north consists of seven vessels in outer coastguard and 2 in inner coastguard. The Squadron in south consists of two vessels in outer and three in inner coastguard. Many of the support services are shared with the Navy and the rest of the Armed Forces.

The Coastguard is also divided in a inner and outer coastguard. The inner Coastguard has its main operating area inside Norwegian inner and territorial waters. The outer Coastguard is operating in the Norwegian economical zone, the fishery protection zone around Svalbard. The outer Coastguard is also used outside these zones if needed, and it is also used as NEAFC² Inspection Vessel. NEAFC is an international organisation that regulates fisheries in given areas outside national jurisdiction, among other is Smutthavet regulated by NEAFC.

The Coastguard Act regulates tasks and the operation of the Coastguard. Coastguard personnel are given a limited police authority in control with the tasks mentioned in §§ 9 to 12. The main task of the coastguard is to claim sovereign rights, supervise fisheries, resource control, custom control, environmental supervision, other control tasks, and search and rescue operations.

² North East Atlantic Fisheries Commission

2 Salvage

The Coastguard is each year involved several different salvage operations. These operations can be done in a variety of different situations. Some will be in more directly distress situation, and others will be in more calm situations. Some issues in this chapter are unique to the Coastguard. Other discussions will be of more general interest. These discussions have been included to create a more complete work. Although not unique for the Coastguard these discussions will still be relevant for the Coastguard.

The salvage rules are internationally laid down by the 1989 Convention on salvage. This is incorporated into Norwegian law in Chapter 16 of the Norwegian Maritime Code (NMC). The International Maritime Organization (IMO) Conventions on Salvage was approved at an international conference in London 28th of April 1989. Norway signed it 26th of March 1990. The purpose of the new convention was to fill some gaps that the Amoco Cadiz accident in 1978 had disclosed.³ The former convention had no part on special compensation when there was danger of environmental damage.

Salvage is, as defined in NMC Section 441 a), any act the purpose of which is to render assistance to a ship or other object which has been wrecked or is in danger in any waters. All objects, including ships, not permanently attached to the coastline can be salvaged. The requirement being that it is in danger and at sea. Further it work on the “no cure no pay” principle. The basic idea being that if nothing of value is saved, the salvors are not entitled to any payment.

It follows from NMC section 450 second subparagraph that the owner may choose who is to save the vessel. In case of environmental danger may the proper authorities override this

³ NOU-1994-23

if the choice of the owner is unsatisfactory. This follows from the Pollution Act § 7 fourth subparagraph. The Coastguard may in such situations save vessel without the consent of its owner.

2.1 Demand for objective danger

The danger to the vessels must be real and objective. The degree of danger must be of a more severe nature than those dangers that a ship is normally exposed to. It is, however, no demand that there is a danger of a total loss or similar, but the danger of damage must be fairly extensive⁴. The dangers need not to be imminent, and there is no demand that it is has to be probable. A danger that only will materialise over time is sufficient. If the vessel could have reached safety by its own means without any extra dangers to the vessel, it can be no salvage award. A danger, which does not materialise, does not exclude a salvage award.⁵ The important factor is that the danger could materialise itself.

A subjective danger is not enough to entitle a rescuer to a salvage award. The Norwegian Supreme Court got the question of the subjective or objective danger in Rt-1996-907 Loran. Loran was a fishing vessel on the way back from fishing near Shetland. She did then suffer from some engine problems, and was towed to port by another fishing vessel and later a tug. The question was if the assisting fishing vessel was entitled to a salvage award. The court held that the ship was not in danger as the Maritime Code and the salvage Convention⁶ describes. Of major importance was it that it was later proven that Loran would have made it to port by own means. The Court then held that “a ship that is not in an objective danger cannot be object of salvage”⁷ One judge took dissent, and held in that the

⁴ Falkanger, Thor; Bull, Hans Jacob; Brautaset, Lasse; Scandinavian Maritime Law; p 450

⁵ Rt-1999-80

⁶ It was at this time the NMC of 1893 and Salvage Convention of 1910, but the newer statute does not change this.

⁷ Rt-1996-911

question of salvage must be assessed in view of the information available to the master at the time. “It is from this they have to do their dispositions”⁸

In *Los-judgement*⁹ from 1999 the question of objective danger arose again. The case was about the pilot boat *Los 102* that in the night between 1st and 2nd of September 1993 got problems with the 240 volt electrical system onboard and the rudder was lock in hard starboard. The pilot boat was about to deliver the pilot to a ship when the problems occurred. The main question for the Supreme Court was if “danger” existed in the way that the State as owner were liable to pay salvage award. It was rainy weather with poor visibility in the area, with winds of near gale strength from west with gale in the gust. There were waves with the height of 1,25-2,5 meter. The pilot boat lost at one point all electrical systems, and had a total blackout. After a while it did get 24-volt electrical system back, and could then control the propeller pitch, it got the light back and it’s radar systems back. The pilot boat then called for assistance from the rescue boat *R/S Ada Waage*. The skip *H/B Askepott* then overheard the call, and offered its assistance. This was accepted since *Askepott* was closer to the pilot boat. After about an hour *Askepott* was next to the pilot boat, and it immediately established a tow. *Askepott* then towed the pilot boat for about 25 minutes before the tow broke. By then *Ada Waage* had arrived, and it was decided that she was to establish a new tow. *Askepott* then returned to port. It was later proven by the state that the pilot boat could have been manoeuvred with ease in her conditions without assistance, but that the crew onboard was not familiar with this procedure. The owners of *Askepott* claimed for salvage award. The court of first instant awarded the owners with NOK 300 000. The State, as owners of the pilot boat, appealed the judgement. The Court of Appeal held that the pilot boat was in danger when it had “black-out”, but that the situation changed when the 24-volt electrical system came back on. The court of appeal only gave *Askepott*’s owners NOK 20 000 in towage remuneration. The case was appealed to the Supreme Court. The Supreme Court held that the pilot boat

⁸ Rt-1996-912

⁹ Rt-1999-74

was in danger, and that the criteria's for obtaining a salvage award was met. The Court held that the danger must be real, and that it must be assessed as the situation was on the time of the salvage. The judge further emphasize that if it is "a risk which exist at the time, but later fails to materialize, it still can be entitlement to an award". The skill and knowledge of the crew should also be a part of the assessment of the danger. The Court weighted the notes done during and immediately after the situation, rather than testimonies done a long time after the situation. Considering those notes the Court found that the pilot boat were in danger at the time Askepott started the tow. The Court gave the owners a salvage award of NOK 300 000. One Judge agreed under doubt that the condition for an award was met, but dissented on the size of the award.

In the case Rt-2004-1909 Norsk Viking the Supreme Court view the danger term once more. The coastal tanker Norsk Viking was on the way southward in Hjeltefjorden on the Norwegian west coast when it suffered some engine problems. Another coastal tanker Senja was on her way north through Hjeltefjorden. After passing each other Norsk Viking called Senja for assistance. Senja then took Norsk Viking on tow for 2 hours and 45 minutes. Norsk Viking then went to port at Ågotnes by her own engine, but with a tug on stand-by. The City Court used the comprehension of danger for those in the situation, and not exact calculations afterwards, in determining if it was danger in accordance with NMC § 441. It came to the result that it was danger, and awarded the owners of Senja. The Court of Appeal came to a different result, and only awarded for assistance remuneration. It held that the subjective sense of danger only can be used as part of the reasoning, and that an objective danger must also be there. The Supreme Court followed the reasoning of the Court of Appeal. It also used the notes from the situation in assessing the danger.

The Los-judgement can be seen as a rejection of the Loran-judgement. The Norsk Viking-judgement can then be seen as a step back towards the thoughts in the Loran-judgement. This is, however, a too short conclusion. The los-judgment does not reject the Loran-judgement; it is more of the specification of the danger term. There is possible to find a straight line through all three judgements. In the Loran the Court dealt with a danger that

could not have materialised itself, or at least it was unlikely that it did. The court found it the question was whether or not the engine would have worked until safety that was important. Not if this was clear at the time of the assistance. In the Loran-judgement the court found that the engine would have lasted until Loran had reached safety. This is different in the Los 102 case, as this danger could materialise itself. Further the Court state that the danger must be objective, and it thereby follows the thought of the Loran-judgement. The Norsk Viking follows both cases. It further establishes that the danger must be real and objective, and it also support the use of evaluating how the situation appeared at the time. Also the use of the crew's skill and knowledge must be calculated into the equation when assessing the objective danger. A vessel with an unskilled and untrained crew might very well be in an objective danger, while a vessel with a skilled crew would be in no danger. To put it to the extreme, a vessel with no trained navigators onboard might be in danger when navigating on the Norwegian Coast. The danger is then both real and objective, as likelihood of the materialisation of the danger is imminent. If the navigators were trained the objective danger would be a lot less. The los-judgement also clarifies that it is the danger at the time of the situation that is relevant. All three cases follow the same line, and they do not contradict each other. The judgment do point out one major difficulty with the objective danger, it can be impossible to actually prove that it exist. In the los-case it is impossible to actually know if the crew onboard the pilot boat had sufficient control over the vessel to bring it to safety. In the Loran this was different, it could be sufficiently proven that the engines would have lasted to safety. Then it cannot be any salvage. As the salvors has the burden of proof, one can say that if they cannot prove objective danger it can be no salvage. This is however not a totally satisfactory solution. As this burden of proof might be as good as impossible if no damage occur, the salvors might be better off in waiting for the damage to occur or almost occur. Although this might effect the salves value and thereby the award, it can be more than normal assistance remuneration. The Los-judgement avoids this; by also using the parties' own impressions in the assessment if objective danger existed.

In English Law it is a similar demand for real and objective danger. The danger has must be “real and sensible” and the danger cannot be fanciful or to vaguely possible.¹⁰ It must also be a danger that is present at the time of salvage. English law contain no salvage for vessel that has been wrecked. It must then also be in danger.

2.2 Vessels that are wrecked

NMC § 441 also state that it can be salvage were the vessel is wrecked. There is no parallel to this in the Salvage Convention. A wrecked vessel can of course be in danger, but there is no need for danger for the wreck to be salvaged. Wrecked was defined as “when an accident of a substantial extent has already happened” by Sjur Brækhus.¹¹ If a wrecked vessel is for environmental purposes ordered removed, it will be a salvage operation.

Normally the owner’s P/I insurer will pay for wreck removal, and it will be done by professional salvors or wreck removers. If this vessel is a small craft without proper insurance, professional salvors might pay little attention to it. Then the Coastguard may be used to remove the vessel. If there is any value left in the vessel, the Coastguard may then claim a salvage award for up to the value of the vessel. If there is no value, or to little value to cover the expenses the owner must cover the cost of the removal. In the new harbour and waterway act¹² the owner are entitled to remove wrecks on the order of the local authorities.¹³ This can also happen if the local authorities wish to remove this boat for more cosmetic environmental purposes.¹⁴ If the owner does not remove the wreck, it can be removed at the owners’ expense.

¹⁰ Kennedy; Rose; Law of Salvage p 160

¹¹ Brækhus, Sjur; Bergning; p 18

¹² Not in force

¹³ Harbour and Waterway Act § 35

¹⁴ When it is no danger to the nature.

2.3 No-Cure no-pay principle and responsibility for the award

The No-cure no-pay principle is based in NMC section 445 first subparagraph and the Salvage Convention article 12. If the operation produces no useful result then it can be no salvage award. This then naturally lead to the question when is it a useful result? The rule is that the vessel has to be brought to safety. This safety has to be of a permanent nature, and a vessel that is brought to a place of temporarily safety is not enough. A disabled vessel must be brought to a place where such reparations can be done.¹⁵ These reparations must be of such nature that the ship can continue her journey by her own means, and at a risk no greater than normal. If a vessel A is towed to a temporary shelter by B, and A then is subsequently towed by another vessel to shipyard. Then B can claim salvage award for its services. If A is lost on the way to the shipyard B has no claim for salvage award. Brækhus suggest that if the subsequent tow is without risk, and the loss has no connection with the original damage, it can still be an award. It can then be said that the vessel is safe when it can continue the journey without the dangers, which necessitated the salvage, or when it can be repaired. The causation between the initial peril and the peril that caused the loss can be weak.

The salvors does not have finish the work themselves. If the first salvors are prevented from continuing the salvage and the vessel is salvaged by others, the first salvors have then a salvage claim for their effort. The first salvage effort must have given a positive result on its own. If the first salvor has left the vessel in the same danger as were in the beginning, it is doubtful if it can be a salvage award. But the effort does not have to produce a useful result on its own. In ND-1909-279 the Supreme Court stated that a vessel, which towed the salvee closer to the coast before it had to go for bunkers, were entitled to a salvage award. The important were that the vessel was subsequently salvaged, and that it was left in a better position than originally.

¹⁵ Brækhus, Sjur; Bergning; p 20

In ND-2005-217 the city court of Ofoten had a similar case. The fishing boat Sørbøen had gotten its fishing gear in the propeller, and was left drifting in Tjeldsundet. It was bad weather in the area with waves of 5 meters. Another fishing boat Åsanøy managed to establish a tow when Sørbøen was just 20 meter from the shore. Sørbøen had at that time already touched bottom. Åsanøy towed Sørbøen for about 5 to 10 minutes before the tow broke. It tried two times to re-establish the tow, but it broke both times. Sørbøen was drifting towards some reefs when the rescues vessel Skomvær III arrived. Skomvær III then established a tow, and towed Sørbøen to safety. Sørbøen's owners claimed that it could be no salvage award because the vessel was left in a more dangerous position than it originally had been it. In the case of a total loss in first position Sørbøen's crew could with a reasonable ease have saved itself to shore. In the second position it would have meant greater danger to the crew. The court agreed that the vessel was in a more dramatic situation in the last position, and that a later arrival of Skomvær would have meant a total loss. It further states that it was lucky that Skomvær arrived in the last minute, but that Åsanøy's effort did make Skomvær's tow possible. Although the situation did become more dramatic, it was the result in the end that matters. That it was a luck of the draw that Skomvær arrived at time did not effect the entitlement to the award, but it did effect the size of the award.

NMC Section 147 gives that it is the ship's owner and the cargo's owner who is responsible for the salvage award and special compensation. They are only liable for their proportion of the award, and therefore it is no joint liability. The salvage award may be secured in an arrest of the ship. It follows from NMC section 51 first subparagraph 5) that a claim for a salvage award may be secured in a maritime lien.

The rule in section 147 will then free chartered owners from liability. It is however possible to contractually deviate from this rule. As the Norwegian Coastguard also charter in some vessel, it will as a starting point not be liable for the salvage award in case those vessels are salvaged.

2.4 Special Compensation

If it during the salvage operation also is risks to the environment special compensation can be awarded. Special compensation is only awarded if the salvage award is less than what earned in special compensation. This will also include those cases when the salvage efforts produce no useful result. The main idea is that special compensation is a remuneration of the expenses incurred by the salvor. If the salvor prevents or limits environmental damage it can be increased with 30%, or when it is found reasonable it can be increased up to 100%. When it should be used 30% and when it should be 100% is left up to the courts. If the extra compensation is increased with more than 30% it is specifically stated that the criteria's in section 446 must be used.¹⁶ The commentaries to the law gives that special compensation only came be given to those who try to salvage the vessel or cargo, and a attempt to only collect leaked oil will not result in special compensation. In different from salvage award, the owner and the chartered owner are severly and jointly liable to pay special compensation. The commentaries state the reason for this is insurance. While the salvage award is covered by the hull insures the special compensation is left for the P&I insurers. Subparagraph three states that with expenses is meant out-of pocket expenses reasonably incurred by the salvor. These expenses do cover all direct and indirect costs that the salvors incurred during the salvage effort. These costs do however need to be within reason. If a salvor use unreasonable many oil lense it will not be covered. The section also opens up for coverage of a fair rate for the equipment and personnel employed in the work.

2.5 Coastguard vessels entitlement to salvage award

It was formerly so that naval vessel was not entitled to a salvage award. This is illustrated in the Kjæk judgement¹⁷ where the Supreme Court, in dissent 4-3, ruled that a torpedo boat could not receive a salvage award. In this case a torpedo boat salved a grounded barge. Of the majority, two judges, out of four, weighted decisively that the Navy's internal rules

¹⁶ NOU-1994-23 to section 449

¹⁷ ND-1919-241 NSC

gave a duty to help vessels in need, and that the crew onboard the torpedo boat did not go beyond their duty. It was also pointed out that “in most and the most important foreign navies the current opinion is, and partly according to the law, that naval vessels both has a duty to assist and that they cannot demand a salvage award”¹⁸. The other two judges held that the Brussels convention on salvage did not apply to state owned vessels. The minority held that the Navy’s rules only put a duty upwards and downwards within the organisation, and not towards others. Among other showing to how similar duties of crew onboard rescue steamers, and how this did not prevent any awards. As far as the Brussels Convention was concerned it only left each state free to decide for its own.

The question was dealt with once more in the Astoria case¹⁹, and it was made clear that minority view is the correct one.²⁰ In this case two tugs and two naval vessels salved the Danish ship “Astoria”, and the state was granted a salvage award in dissent 4-1. The majority of the court held that this was a different case than the one from 1919, but if it was the same it were strong arguments to abandon that judgement. One of these was that the 1919 judgement weighted that in leading maritime nations naval vessels were not entitled to salvage remuneration, and in 1958 this had changed. Especially important was that in Denmark, which has the same salvage rules, naval vessels were entitled to salvage remuneration. It also answered negative to the question if after the 1919 judgement there were created a customary law. The judgement, as stated²¹, largely follows the view of the minority in 1919. The minority vote found that the 1919 judgement was an expression of valid law that only could be dissented by positive law.

¹⁸ ND-1919-243 NSC

¹⁹ ND-1958-247 NSC

²⁰ Brækhus, Sjur; Bergning; side 39

²¹ ND-1958-251

The view of the “Astoria” judgement is later confirmed by law. In NMC Section 442 second paragraph it is stated that the provisions also apply if the ship is owned by a state.²² Section 451 Subparagraph 2-3 confirms this view, as it apportion 2/3 of the award to the State. These sections make it clear that also state owned vessels are entitled to a salvage award.

After the “Astoria” judgement it has been clear that the naval and other state owned vessels are entitled to a salvage award. The Coastguard also is regulated by the coastguard act, which define “search and rescue operations” as duty.²³ Can this duty affect entitlement to salvage awards? First it is natural to examine how far this “search and rescue duty” goes. It is natural to see this duty as a to primarily rescue human life. This can also be understood from the law itself, which state that the coastguard shall as far as possible assist persons who is seriously ill or injured or of other reason in apparent distress.²⁴ The fact that only persons are mentioned in the paragraph gives an indication of what is most important. It is without a doubt understood that if given the choice of rescue human life and rescue property, the human should be rescued. In real situations this line between saving life and property is not so clear. Saving property can be the best way of saving life. From the commentaries it is clear that the Coastguard’s participation in SAR is considered assistance to the police, because the police chief runs the joint rescue coordination centres in Norway.²⁵ SAR is then also regulated under § 17, assistance to the police. If the wording of the commentaries is read literally the duty from § 14 only apply as far as the joint rescue coordination centres is involved. If this is the correct understanding of § 14 the duty is limited to the rescue of human life, as this follow centres official assignment.²⁶ Even environmental protection then falls outside this duty.

²² Falkanger, Thor; Bull, Hans Jacob; Brautaset, Lasse; Scandinavian Maritime Law; p 461

²³ Coastguard Act; § 14

²⁴ Coastguard Act; § 14.

²⁵ Ot.Prp. nr. 41 1996-1997

²⁶ Joint Rescue Coordination Centre; homepage

In § 14 it is used the words accident and danger, which do suggest that this duty only apply when it is somewhat of an immediate danger or need for assistance. It is also fair to say that the duty participating in SAR operations is only partly parallel to salvage operations. It is possible for the coastguard to participate in a salvage operation, which do not fall under its duty in § 14. Then the coastguard must be entitled to claim for a salvage award.

If the salvage operation is parallel to the duty in the coastguard act, then how will this effect the award? Earlier it was so that if it was a duty to assist no salvage award were payable.²⁷ This is illustrated in Kjæk-judgment. There two judges held that the navy's internal rules gave an duty to aid vessels in need of assistance, and it thereby it could be no award. Also the minority of 3 judges held that there could be no award if the salvor only fulfilled its legal duties to the salvaged.²⁸ The Astoria-judgement does follow the minority from the Kjæk-judgement. The duty in § 14 is a general duty. If the coastguard is entitled to a salvage award for only fulfilling its duty, are then personnel at the joint rescue coordination centre also entitled to a salvage award? It is then reasonable that also their efforts can be remunerated. The preparatory works²⁹ of NMC does solve several of these questions.

It follows from the report to NMC section 442 that efforts done by Joint rescue coordination centre will not entitle to an award. The reason for this is that it only performs its primary duty. This section further states that public salvors must be in a special position towards salvage law. As far as a public salvor only performs its primary task, which is given by law, it should be no salvage. The preparatory work uses an example of the fire department that puts out a fire onboard a ship. This is in itself a salvage act, but it's also the primary task of the fire department. The fire fighters are therefore not entitled a salvage

²⁷ Brækhus, Sjur; Bergning; p 30

²⁸ ND-1919-245

²⁹ NOU-1994-23

award. If the fire department also pumps water out of the ship the situation is different. This effort can then be basis for a salvage reward. There is a possibility to get salvage award for efforts inside the primary task, but then the effort must be beyond what reasonable is expected of the individual official or civil servant. It is only specific law given task that affect salvage awards. If the state employees are imposed many general and wide-range tasks, this will not effect any salvage awards. Of example is mentioned navy vessels instruction to assist vessel in distress. This will not affect the opportunity to gain a salvage award.

It is a question of how far the duty in §14 can go. Is it only to the extent that it can be done without danger to own vessel or crews life? If such a duty is to be performed without any dangers it simply cannot be done. Some danger must be accepted. It seems however unreasonable that such duty, is a duty to put own life in vast dangers. It should then also be considered that the Coastguard largely use conscripts as smoke divers. It then seems very unreasonable for the conscript to put their life on the line only for a conscript salary. Even when it is life salvage this duty must have a limit. It can be natural to compare such danger with those of regular fire departments on shore.

The question is then how the duties in the Coastguard Act affect a claim for an award? Is the duty in § 14 a primary duty? The duties defined in the coastguard act are law given duties. The coastguard act gives no specific guidance towards defining the SAR as a primary task or not. It is listed under coastguard act chapter 3 “The Coastguards tasks”, but so are several other tasks. The example in the preparatory work to NMC can give some guidance though. That the fire department is given no salvage award for fire fighting, but may be given it for pumping the vessel. Although not a primary task, pumping of water is not a very distant task for the fire department. This suggests that it is no need to perform tasks far from its primary task to be entitled to a salvage award. Considers this up against the Coastguard Act § 1 which states that the coastguard is to contribute to the governmental control with the territorial waters and the seas outside. This then suggest that this is the

primary tasks of the coastguard. Then SAR is a secondary task, and it will not prevent the Coastguard any from claiming a salvage award.

Environmental protection is mentioned in § 11 and §12 of the Coastguard Act. It is then given the duty of the Coastguard to control that the rules in the Pollution Act etc are followed. The same discussion as above will also apply to environmental protection. The result is also the same, environmental protection will not limit any salvage awards. Another argument for this solution is that it should not pay for vessels to wait for governmental interference. If it could be no salvage award if the coastguard salvaged a vessel for reasons of environmental protection, it could tempt owners to wait for a coastguard vessel. This then might lead to more environmental loss, as owners might refuse commercial actors to salvage.³⁰

2.6 Distribution of salvage award and NMC section 451

The apportionment of the salvage award is regulated by NMC section 451. First shall “any damage that the ship, cargo or other property on board may have sustained in salvage operation”³¹ be deducted. Then fuel, wages and food cost shall be deducted. Then the net salvage award shall be apportioned as set out by paragraph two point 1) to 4). The normal rule is that the ship owner gets 3/5 of the award. The rest is distributed among the crew, where the master receives 1/3 and the rest of the crew split the last 2/3. The crew split their part on the basis of their salary.

When the salvage is performed by a state owned ship, the state receives 3/5 of the award. This is the same amount as a regular ship owner. Then the rest is distributed after rules set out by the King. It was then the preparatory committee’s view that, due to the special circumstances in the use of conscripts, these rules should be set out by the King. The rules

³⁰ Nasjonal slepebåtbereidskap; Rapport fra arbeidsgruppe; p 40

³¹ NMC Section 451, first paragraph

of apportionment may be set aside when particular reasons indicating a different apportionment.³²

If the Coastguard has guest or scientific researchers onboard these will not be calculated as the crew.³³ The reasoning is that these do not have their normal working place onboard and will only be onboard for a limited time. The guest and scientist may be granted a part of the award on basis of individual efforts. On the other hand is guest included in the right of the state to refrain from claiming a salvage award.³⁴ This follows from the use of a wide interpretation of “those on board”³⁵. Also pilots will be included in the term those onboard.

The state may refrain from claiming salvage awards without incurring liability towards those on board³⁶. This is a special rule that only applies to state owned ships. Sjur Brækhus indicates that the reason for the rule can be that the State is bound by a treaty to refrain from claiming salvage award, or it might be political unwise.³⁷ The state is also bound to not claim a salvage award if it saves a naval vessel from a fellow NATO member.³⁸

Third paragraph gives the main rule that crew cannot waive their right to salvage award. An exception is made for crew on board vessel specially equipped for salvage the right to waive their rights to a salvage award. Also crew that muster on for a particular salvage

³² NMC Section 451, second paragraph, 4)

³³ Innstilling II fra sjølovskomiteen; 1961; p 20

³⁴ Innstilling II fra sjølovskomiteen; 1961; p 25

³⁵ In Norwegian: ombordværende

³⁶ NMC section 451, second paragraph, 3), third sentence

³⁷ Brækhus, Sjur; Bergning; p 100

³⁸ Agreement between the Parties to the North Atlantic Treaty regarding Status of their Forces; Art VIII nr 1

operation has this right. In a ruling from 1980 the Supreme Court has made clear that this waiver need not be explicit, and implicit agreement is enough.³⁹

Is coastguard vessels specially equipped for salvage? In the 1980 judgement the Supreme Court states that a supply vessel is. This will suggest that at least the Coastguard's vessel specialized for towage standby⁴⁰ is included. This vessel, at present Norwegian Coastguard Vessel (NoCGV) Harstad, will be in standby to perform towage operations, but it can perform fishery inspections and other task while in standby. This is the same as for supply vessels, as these also perform other tasks while in salvage standby. The equipment onboard NoCGV Harstad is also specialised for towage and environmental salvage. When it comes to the other vessel in the Coastguard it is more uncertain. Also these vessels has towage equipment, and other equipment used for salvage. The question is how specialized the vessel must be? By allowing supply vessels to be inside this category, the Supreme Court allowed for vessel with other tasks to be in this category. The central question must then be if Coastguard vessels are equipped for salvage. As Coastguard vessels have fire fighting equipment and other salvage equipment to be used externally, they must be in said to be specially equipped for salvage.

The chartered coastguard vessel might be in a special situation. It follows from section 451 second subparagraph 1) that it is the "reder" who should get 3/5 of the award. This then suggests that it is the charter contract between the state and the ship owner, which decide who is entitled to the salvage award. In the case of the charter party is silent on these areas it is governed by Norwegian Law. NMC § 386 gives some guidance. It here states that out of the time carrier's portion of the net salvage award or net special compensation the time charterer is entitled to one third. The time carrier will be the ship owner, and the state will be the time charterer. So the ship owner will be entitled to the salvage award, and then the state as a charter to one third of the owner's portion of the net award. In the charter-party

³⁹ ND-1980-190-NSC

⁴⁰ In Norwegian: slepebåtberedskap

between the state and the owner the vessel is considered as a state owned vessel.⁴¹ The owner will then lose all claims for salvage award. The state may, however, deviate from this and allow for a salvage claim in special situations. An example of such situation is if the owner has been inflicted losses in the salvage operation, which is not covered by the insurer.

When it comes to distribution among the crew it can also raise some questions. First it can be of some trouble that there are two masters. There is both a civilian and a military master. Also if conscript should be treated as in other state-owned vessels can create some problems. The charter party solves this by stating that in case of salvage the military crew are not to be seen as a part of the regular crew.⁴² This then creates the problem if the military crew are to be treated as if they had waived their right to an award, or if they are to be treated as guest. In the case of the latter they will be entitled to a share of the award on their individual salvage effort.⁴³ In case of the prior, they will not be entitled to any award.

2.7 Damages to salvaged vessel

What effect has damages to salvaged vessel incurred by the salvors on the salvage award? Sjur Brækhus indicates three different solutions to this problem.⁴⁴ It can be a penal solution, indemnity solution or an adjustment solution.⁴⁵ There are two main situations where the salvor can be faulty or negligent. Either where the fault or neglect leads to the situation. An example being negligence leads to a collision, after which the negligent ship salvages the innocent ship. The other situation is fault or neglect that occurs during the salvage operation. The two situations will be dealt with separately.

⁴¹ Nasjonal slepebåtbereidskap; Rapport fra arbeidsgruppe; p 42

⁴² Nasjonal slepebåtbereidskap; Rapport fra arbeidsgruppe; p 43

⁴³ See 2.6 above

⁴⁴ Brækhus, Sjur; Uaktsom berger; p 149

⁴⁵ See 2.7.1 below

2.7.1 Fault or neglect prior to the salvage

First it is important to distinguish between the degrees of fault. If there is intent the case will be treated differently than if it is negligence. Intent will also easily involve some sort of criminal liability, especially where there are risks of personal welfare involved. As intent to cause the damage is, seemingly, less common this will not be discussed any further.

Ship A collides with ship B, and both A and B is to blame. Later B salvages ship A, and claim a salvage award. How should this be dealt with? If the penal solution is used the award is denied. The major idea is that one should not be able to profit from ones own fault.

The indemnity solution has a different approach. If this solution is used the salvage award is calculated in the same way as if no fault had happen. Then the damages to ship A are calculated by use of tort law. This sum is then subtracted from the salvage award, and that amount can be claimed by A or B. The ship to blame will be liable for a proportional share of salvage award. There are two main situations where the indemnity solution may be unsatisfactory. First it can in given situations deny a salvor of the whole award, or it may grant full award or a too high award even if situations indicate that a certain reduction is appropriate. The first situation is when one ship is fully to blame, and it later salvages the other ship. Then the loss of the salvaged ship increases with the salvage award, as the blameworthy ship is to indemnify the innocent ship for the salvage award. Then the blameworthy ship is deprived of any remuneration no matter how skilful the salvage is done. The second situation is when the salvor can limit its liability in accordance with global limitation rules. Given that the salvor is fully to blame, and that the damages are so comprehensive that the salvor can limit his liability before the salvage award is calculated into the settlement. Then, as the innocent ship cannot limit his liability to pay a salvage award, the salvage award must be paid in full. Also in both-to-blame situations limitations rules might give similar results.

The third solution, the adjustment solution, is a mix of the other solutions. This solution seems to be the one drafted in law in section 450 third paragraph. The wording may deprive whole or part further suggest that the solution is first to calculate the whole award, then deprive the faulty part of the appropriate amount.⁴⁶ The commentary to the section gives no guidance to how this appropriate amount shall be calculated.

After a collision both masters has an obligation to render assistance in accordance with NMC section 164. This duty only goes as far as it can be done without serious danger to the ship and those aboard, and it apply to both ships independent of fault. Salvage that falls under section 164 does not independently disentitle to an award. If the salvor is at fault and the salvage done is only of the character mentioned in section 164, it is questionable if the salvor is entitled to an award. In the case ND-1969-445 NCA the court found that the salvor was not entitled to an award, partly because the work done was only such of a duty". This then suggests that in such cases there is an need to go beyond the duty of section 164.

English Law did for a long time favour the penal approach.⁴⁷ Of particular importance is the case *The Cargo ex Capella*⁴⁸ from 1867.⁴⁹ In this case two vessels was involved in a both to blame situation, and Dr. Lushington held that one of them had no claim for a salvage award for salving the other's cargo after the collision. This was followed by numerous similar decisions. In the case *The Beaverhood v. The Kafiristan*⁵⁰ from 1938 this view was invalidated.⁵¹ Particular the speech of Lord Writte supported that a fault of the salvor that lead the necessity of the salvage does not disentitle the salvor from an award. This now has to been seen as the position of English law. The main rule now is an

⁴⁶ Brækhus, Sjur; Uakstom berger; p 155

⁴⁷ Brækhus, Sjur; Uakstom berger; 149

⁴⁸ (1867) L.R. 1 A & E. 356.

⁴⁹ Kennedy & Rose; Law of Salvage; p 505

⁵⁰ (1938) A.C. 136

⁵¹ Kennedy & Rose; Law of Salvage; p 508

indemnity solution, but if a party at fault fails to obtain a salvage award it may still be awarded a reasonable sum for services rendered.⁵²

2.7.2 Fault or neglect during salvage

If the fault or neglect happens during the salvage operation similar solutions may be used. If the penal solution is used the award is subtracted in two ways. First the ship or goods saved has a diminished value in after the damage occurred, and the salvage award is normally reduced accordingly. Second the faulty act is part of the total picture when the salvage adjustment is taking place. So such act will be contribute negatively to the skill and effort the salvors put into salving the valuables, as this is one of the criteria's for fixing an award in section 446. The blameworthy act must not necessary be of such a nature that it can be compensated in tort. Also lesser form of blameworthy acts may have an effect. This is important as the degree of fault must be seen in conjunction with the level of stress etc that are in the salvage operation, and as a consequence compensation of damages might be hard to get.

The penal solution was used by the Supreme Court in the case ND.1963.166 NSC. In this case the vessel Grane grounded when it was towing the vessel Bjørg to safety, and the both sustained severe damages in the following collision. The court of first instance sat the salvage award at NOK 7.500, which disregarded the grounding and the collision. The Court of Appeal and The Supreme Court held that damages after the grounding and the following collision, although it was due to negligence on Grane's Master's part, could be calculated into the award. The award was in the end raised to NOK 15.000, which partly remunerated the damages. In ND-1951-712 "Lofoten" did a negligent salvor receive full compensation for damages to own vessel after a collision during the salvage operation.

The indemnity solution gives the salvaged vessels owner the opportunity to seek full redemption from the negligent salvor. The salvor can then subtract its share of the salvage

⁵² Kennedy & Rose; Law of Salvage; p 509-510

award. The commentaries to section 444 first subparagraph opens up for the indemnity solution, as it opens for a breach of the duties in letter a) and b) might lead to liability for the salvor. The indemnity solution is most beneficiary to the salved when the damages surpasses the award in value. The Swedish court of appeal did in ND.1954.616 “Eivor” use the indemnity solution when the court subtracted the damages from the award.

The commentaries to section 450 third subparagraph states that situations dealt with in that section are different then when the salvors are to indemnify the owner for damages as in Section 444. This suggests that the two sections are to be seen completely separately. This would then mean that section 450 third subparagraph only deals with situation prior to the salvage and dishonest behaviour, like fraud or theft. Section 444 first subparagraph deals with duties of the salvor, and a breach of the duties in letter a) and b) might lead to liability for the salvor. Damages to the salved vessel caused by the salvor may then only be compensated if section 444 is breached. If it is breached the damaged part can seek compensation in accordance with NMC or ordinary tort law. Also if the damage is of such character that the ship is lost the owner may seek to get indemnity from the blameworthy part, but since the operation was unsuccessful the salvor will get no salvage award.

If there is no breach of the section 444 it can be no reduction of the salvage award. It can however still affect the fixing of the award, and especially the value of what is saved.⁵³

This would then mean a change in Norwegian salvage law. As seen above has previous judgments used the penal solution when salvors has caused damage. This change would then mean that the indemnity solution is to be used. The indemnity solution may also produce unfair results. As individual mistakes can have enormous consequences, it may lead to situations were the salvor has nothing left despite of great efforts. Fear of liability may also discourage potential salvors from engaging in salvage.⁵⁴ Salvors are on the other

⁵³ NMC section 446

⁵⁴ Brækhus, Sjur; Uaktsom berger; p 162

hand protected by a high negligence standard.⁵⁵ Also the salvee may suffer from unfair results. As if the salvor's negligence leads to huge losses for the owner. If this does not result in liability for the salvor, the salvor is entitled to a full award. The salvor might even have done more harm than good, but is still entitled to a full sized award.

It is stated in the commentaries to section 444 that only pronounced deviations from diligent behaviour can cause liability.⁵⁶ Further the commentaries shows to Brækhus: Bergning on page 43:

Bergerne arbeider på “no cure no pay” vilkår, og må stå forholdsvisfritt i sitt skjønn over hva som skal søkes berget og over hvorledes bergningen skal gripes an. At bergningen ofte forgår under meget vanskelige ytre forhold, hvor den personlige påkjenning er stor, tilsier også at man må unnskylde feil som gjøres, selv om tilsvarende feil begått under andre forhold ville ha blitt karakterisert som culpøse. Med utgangspunkt i den vanlige culpabedømmelse kan man formodentlig si at bergere bare bør pålegges ansvar hvor skadeforvoldelsen er skjedd forsettelig eller grovt uaktsomt.

The commentaries uses the words “pronounced deviations” and from Brækhus it seems like it is only intentional or grossly negligently acts that can incur liability in salvage operations. In later literature, however, Brækhus has a different view on this.⁵⁷ In this article Brækhus shows to that although salvage operations often are done under high pressure, it is not always so. It would be unreasonable that salvor in a calm salvage situation should have a different culpa norm than others in similar situations, which is outside the term salvage. Further suggesting that the negligence term must be flexible.

In English law the salvor's negligence can have three effects on the salvor.⁵⁸ First, the salvor can be held liable for the damages. Second, the negligent act can diminish the value of what salved, and thereby reducing the award. Third, in fixing the award regard is to be

⁵⁵ See 2.7.2 below

⁵⁶ NOU-1994-23; til § 444

⁵⁷ Brækhus, Sjur; Uaktsom berger; 1984

⁵⁸ Kennedy & Rose; Law of Salvage; page 518

made to the salvors misconduct. One should avoid penalizing the salvor's two or three times for the same negligence. In the *Tojo Maru*⁵⁹ case the House of Lords held that the award claim and the damages for negligence was two separate issues. The calculation of the award was to be calculated as if no negligent act was done, and this was to be deducted from the damages. This case follows indemnity solution. Damages may be remunerated through ordinary tort law or contract law.

2.8 Other situations when the award is deprived

If the salvor has been guilty of fraud or other dishonest behaviour, the salvor might be deprived of whole or part of the award. A likely scenario is if the salvor is guilty of theft of the cargo or the salvaged ship's property. Even though the value of the goods that are stolen might be small compared with the value of the ship salvaged, the salvors might be fully or partly deprived of the award.⁶⁰ The deprived value might be much greater than the lost value.

During the drafting process of the salvage convention the French delegate proposed an amendment to article 18. This proposal added the phrase "or if the salvor has failed in his duty to avoid or minimize damage to the environment"⁶¹ The intention from the French delegate was that the salvors also should be deprived for whole or part of the award if the salvor failed to avoid damages to the environment. The French delegate, MR. Douay, stated: "we should not only punish faults in relation to the salvage of property but also a fault due to the fact that avoiding damage to the environment was not carried out".⁶² The Irish delegate expressed concerns that the proposal might be counter productive. Several delegates shared this concern. In an indicative vote over the proposal there was 9 votes in favour and 34 votes against, and as a consequence the proposal was withdrawn.

⁵⁹ *The owner of the M/V Tojo Maru v. N.V. Bureau Wijsmuller* (1972) A.C. 242

⁶⁰ Brækhus, Sjur; Bergning; p 44

⁶¹ CMI; The travaux préparatoires of the Convention on salvage, 1989; p 436

⁶² CMI; The Travaux Préparatoires of the Convention on Salvage, 1989; p 436

2.9 Damages to salvor's vessel or materiel

How may the Coastguard be remunerated for damages that happened during salvage? The Coastguard often will be reluctant to claim a salvage award, and it will therefore be of interest if the Coastguard can get remunerated in an other way than with a salvage award? The Coastguard may of course also claim a salvage award for only the amount of the damages? How will fault by the Coastguard affect the salvage award?

If the salvor's vessel or materiel is damaged during the salvage operation compensation for this can be calculated into the salvage award. This is in accordance with NMC section 446 f) in fixing the award it shall be attached importance to the time spent, the expenses and losses incurred by the salvors. This is also possible if the damages are caused by the salvor's own fault or neglect. In the "Grane" case⁶³ the Supreme Court also considered damages to Grane into the award, even though the damages were caused by "Grane's" own neglect. The Supreme Court only compensated for part of the loss. In the ND.1951.712 "Lofoten"⁶⁴ did the Court find that the negligence of the salvor "Håløygen" was not so gross that the owner should be held without recoup of damages. Since it only was simple negligence the court held that the salvor could get full compensation for the damages.

The Coastguard may only claim a salvage award for the damages to its own vessel and materiel. If this damage is caused by the negligent or other fault of the Coastguard's personnel the damage may only be partly remunerated. This would be an unfair result; as if the Coastguard had claimed a full award it would have gotten more than the damages. The salvage award would include both an award for the effort and a compensation for the damages. A court should see this and compensate fully for the damages to the Coastguard.

⁶³ ND-1963-166; See above

⁶⁴ See above

If the Coastguard instead of claiming for a salvage award had claim for damages in tort it would be different. The Coastguard own contribution to the damages should then be considered, and the damage may be reduced.⁶⁵ The result would be the same if the claim was based in collision liability under NMC chapter 8. The Coastguard would in these situation benefit from claiming salvage award rather than damages in tort.

If the loss is caused by the rescued vessel's crew own fault or neglect the damage might be compensated for the whole amount or part of the amount. These expenses can be added to the award. If the damages is so severe that it exceed the value of the salved vessel or if the salvage produced no useful result a different solution must be used. If vessel A has suffered an engine breakdown and is subsequently under towage by B. Then A manage to get its engine up an running, and during a test run they engage their axel with full pitch on their propellers. This then causes A to run into B, causing severe damage to B's aft. A's act is then either negligent or gross negligent. B subsequently salves A, and the damages after the collision is remunerated in the salvage award. If then the value of the salved the ship A is less than the B's claim the first solution will not be satisfactory to B. B can then be indemnified in accordance with the rules of collision liability. The use of a flexible culpa norm must be then the same as if the damages were to the salved vessel.⁶⁶ The reasoning for this flexible culpa norm rule is that the conditions under which the operation is done is so difficult and stressful that fault must be accepted. It then seems natural that the vessel in danger, which operates in the same or in a more difficult situation, should have the same level of protection.

2.10 Salvage of State-owned vessels

As a main rule there are no different solution to the problem, when a coastguard vessel or other state-owned vessels are salved than when any other vessels are salved. The thoughts in section 2.2, 2.3 and 2.4 will also apply to Coastguard vessels and other state-owned

⁶⁵ Tort Act § 5-1

⁶⁶ See 2.7.2 above

vessels. Some problems may occur when calculating the value of the vessels and with the immunity of state owned vessels.

Calculating the value of state owned vessels might involve some problems. Especially is this true when it comes to specialized navy and coastguard vessels. As these vessels are of no commercial use there is a very little market for sales of these kinds of vessels. There are also important that different states will be reluctant to sell used vessels to anybody. Only approved or allied states will usually be considered eligible buyers. This will make the market even smaller. When these ships are sold it can also be at a “friend” price. As when Norway sold its old “Kobben-class” submarines to Poland in 2003 for almost nothing. This was of course not what the Norwegian government valued the submarines to, but more of political wish to modernise and NATOnise the Polish fleet. Brækhus indicates that in the calculating the value of naval vessels one should use a technical value instead of the market value. One should find the re-purchase price and subtract for usage. In ND-1951-714 NA is the value of the corvette Norkyn was partly discussed.

Article 4.1. of the Salvage Convention stipulates that the Convention does not apply to State-owned vessels. In article 4.2. each state is given the choice to apply the Convention to its state-owned vessels. Norway has taken the approach of article 4.2, and salvage does apply to state owned vessels. The same has Denmark, Latvia, Netherlands, New Zealand, Russian Federation and United Kingdom, while states like China, Greece, Lithuania, United States does not allow state owned vessel to be subject to salvage.⁶⁷ If then a state-owned vessel from a Convention state⁶⁸ is salvaged in an other convention state some issues arise. First, as this ship has immunity, it can not be subject to an arrest. If the state is unwilling to pay the legal actions must be brought forth in that state. A state that has not exercised its right in accordance with article 4.2. can then reject any claims for salvage

⁶⁷ CMI Homepage; www.comitemaritime.org/cmidsocs/impl.html; the list is not exhaustive

⁶⁸ A state that has ratified the Salvage Convention

award. If the has recognised those rights the claim can be settled in that state. If the state wishes it could also be settled in the state where the salvage occurred.

2.11 Salvage and insurance

In the Norwegian Marine Insurance Plan of 1996, version 2007 (NMIP) the main rule is that the Insurer covers the salvage award. This follows from NMIP § 4-12 and § 4-18. The Salvage award is viewed as a cost of minimising the loss, and the insurer is liable for the award. If the salvage also minimise loss for the cargo owners, the hull insurer is only liable such proportion of the loss that reasonable can be attributed to the interest insured.⁶⁹ This also applies if the vessel is a fishing vessel, and is insured as a fishing vessels under the NMIP. If the cargo interest is insured under the Norwegian Cargo Clauses it follows from § 25 and § 39 that the insurer covers the salvage award. For the insurer to be liable for the award the insurer must have been liable for the loss, if the salvage was unsuccessful. This follows from NMIP 4-7 and Norwegian Cargo Clauses § 39, which refers to the Insurance Contract act § 6-4. In the Norwegian Cargo Clauses and NMIP salvage expenses is introduced as a general average act.⁷⁰ This does not apply to special compensation costs. These costs are covered by the P&I insurer.

Damages to the salvor's vessel that are not calculated into the salvage award are treated as any other damage. The insurer will be liable if the damage is caused by an insured peril⁷¹ during the insurance period, and if it causation between the damage and the peril. Further the liability must be in accordance with NMIP chapter 13 and specially § 13-1.

Damages to own vessel are recoverable under chapter 12 and specially § 12-1. This is given that the damages is caused by an insured peril during the insurance period.

⁶⁹ NMIP § 4-12, second subparagraph

⁷⁰ Falkanger, Thor; Bull, Hans Jacob; Brautaset, Lasse; Scandinavian Maritime Law; p 463

⁷¹ NMIP § 2-8 and § 2-9

On some occasions it might be different interests between the insured and the insurer in deciding if it should be an salvage attempt. If the insurer do not wish for a salvage attempt, but the owner wish to make an attempt to salve the vessel the NMIP has a simple solution.⁷² By paying the sum insured the insurer will be free of liability, and the insured may try to salve the vessel on his own account. If on the other hand it is the insurer who wishes for a salvage attempt it is different. NMIP § 11-2 provides that the insurer may try to salve the vessel for the insurers own risk and expenses. Then the assured is obligated to do the utmost to enable the insurer to do the salvage.⁷³ In accordance with subparagraph two the assured may claim compensation for a total loss if the salvage operation is not completed within six months. There is one exception to the to this rule that if ice conditions delays the salvage operation the time is extended correspondingly.

⁷² Wilhelmsen, Trine-Lise; Bull, Hans Jacob; Handbook in Hull Insurance; p 231

⁷³ NMIP § 11-2, first subparagraph, second sentence

3 Towage

Towage is done on a wide variety of occasions in the coastguard each year. Some cases are well inside the salvage category, and others are outside of the salvage category. This is being due to the material not being in danger, or of other reasons. On some occasions the Coastguard also has towed a captured vessel suspected of being in breach with fishery regulations. When performing a towage operation a vessel endures the increased risk of several dangers. These being the increased risk of collision between the tug and tow, collision between tow or tug and third vessels, or the risk of grounding due to less manoeuvrability of the vessels. Dangers are involved if the tow breaks, both to the tow and to personnel on board the ships.

This chapter is about those towage situations that are not salvage operations. Where the line between a salvage operation and other operations goes, are not discussed any further. Most tows that are preformed are under a contract.⁷⁴ The Coastguard sometimes sets up contracts when performing towage, but it also does tows without contract, and so a major part of this discussion will be outside contracts. In the end it will be discussed if the Coastguard could benefit from using a type of contract in all situations.

3.1 Towage without contract

If no conditions of the tow is agreed normal rules of liability is used. If it is a collision the liability is based in NMC section 161. If one part is fully to blame, this part must cover all damages. When both parts are to blame the main rule is then that each side at fault is only liable for such proportion of the damages that falls upon it. If there are faults at both sides,

⁷⁴ Healy, Nicholas J; Sweeny, Joseph C; The Law of Marine Collision; p 254

but there are no grounds for apportionment of the damages are split equally. When the collision is accidental, and no fault can be established each side cover its own loss.

It follows from NMC section 161 third subparagraph second sentence that in case of personal injury both sides are jointly and several liable. This also follows from the tort act § 5-3. This then applies to all collision cases, and not just those involving a tow. One example when this can have major impact is when it involves a cruise ship. If the Coastguard tows a cruise ship and this leads to damage to the ship and its passengers. Then the injured passengers have then an opportunity to claim for damages both towards the cruise ships owner and to the Coastguard. Normally the cruise ship will have liability insurance to cover these cases, and the injured may claim for damages from the ship owner. Then the ship owner or insurance company will have a right of recourse for the amount proportional to the fault of the Coastguard.⁷⁵ The injured may also claim for damages directly from the Coastguard. The Coastguard then has a recourse claim towards the owner. The Coastguard may then limit its liability in accordance with chapter 9.

The liability for damages caused by grounding must follow from general tort law. The result should then be similar to that of section 161. If only one part is to blame, this part is liable to pay damages to the other part. If both are to blame, then it seems natural that the each part covers the loss proportionally to their own fault.

Damage during towage can lead to oil pollution. The polluter will then be strict liable for the oil pollution.⁷⁶

The ship owner is liable for the damages caused by the tug. This comes from NMC section 151 first paragraph, which identifies the ship owner with the tug. The ship owner has then recourse against the tug, in accordance with section 151 second paragraph. The recourse

⁷⁵ NMC Section 161 fourth subparagraph

⁷⁶ See chapter 4 below for further discussion

opportunity, which often is little lucrative as it is against single employees without large economic funds, can be used against tug owner. This recourse is then of course more lucrative, and even more so if the tug's owner is the state. The tug may limit its liability in accordance with the statutory provisions.

It should also be considered that the Coastguard does the towage free of charge. From English law it follows that even when a tow is done free of charge the tug is obliged to exercise reasonable care in the performance of the tow, and it is liable to the tow in tort if the tow is done negligently.⁷⁷ Though the gratuitous nature of the tow will be relevant. It also follows from English law that a person cannot be liable for neglecting to perform a voluntary act. So it is only the performance of the tow that can lead to liability, and not the omission to perform the tow.

In Norwegian law no similar rule exists. However the lack of commercial gain from the tug service should affect the liability claim. It can affect the question of who is it natural that covers the loss? As it damage after a free service it seems more natural that the tow rather than the tug covers the loss. The tows owner is also responsible for the tug. The tow is especially vulnerable to damage. The demand for how the tug service is executed should be less strict for services rendered for free than those whom the owner pay for. The effort put into a service free of charge must be expected to be less than if it is a commercially motivated service. The degree of fault will be of importance. If the Coastguard acted with gross negligence it will be more natural for the Coastguard to cover the loss, than if the loss was caused by simple negligence. It should also be considered that the service saved the ship owner from towage expenses. If the gratuitous nature of the service has not been expressed, the Coastguard may claim for assistance remuneration for its services. The claims can then be set up against each other.

⁷⁷ Rainey, Simon; Law of tug and tow; p 3

At some instances the coastguard has also towed a captured vessel suspected of being in breach with fishery regulations. Damages and losses involved in such situations should as a starting point be treated as other damages. But the question is if the fact that the captured vessel has created the situation should be given any weight. If the captured vessel had done it's duty according to Norwegian fishery regulations the damages would not occurred. The Norwegian tort act §5-1⁷⁸ gives that injured own contribution should also be calculated into the assessment. The first paragraph gives that the compensation can be reduced or be set to nothing if the damage is partly self-induced. From the second subparagraph it comes that a contribution also can be not removing or reducing the risk for damage. When a vessel chooses to not use own machinery it does not remove a risk that could have been remove. All parties understand, or at least should understand, that a tow is far more risky than normal transit to port. There is also causation between the act of not using own machinery and the increased risks, and it is causation between the increased risk and the damage. This then leads to causation between the act and the damage. How much reduction of the compensation this leads to must be assessed in each case individually. It will be influenced by the degree of fault shown by the Coastguard. If the Coastguard has caused the damage through gross negligence the reduction should be less than if it is caused by ordinary negligence.

In case of liability of the Coastguard, it may limit its liability in accordance with NMC chapter 9. See chapter 5 below for further discussion.

3.2 Towage with contracts

3.2.1 Standard towage contracts

Usually a contract is regulating the relationship between the tug and tow. This contract may also regulate liability between the tug and tow. There are many different standard contracts and conditions for towage in the world. Some of the main standardised contracts and

⁷⁸ Tort Act; § 5-1

towage conditions are the UK Standard Conditions for Towage and other services published by the UK tugowners association, and in Scandinavia the Scandinavian Tugowners Standard Conditions. Generally these conditions have clauses that exclude large part of the liability of the tugowner. In the Scandinavian Standard Conditions the owner will only be liable for fault or neglect on the part of the management.⁷⁹ In case of damage to the tug the hirer shall indemnify the tugowner for the loss, unless the hirer can prove that neither he or anyone he is liable for is totally or partly liable for the damages. This reverses the burden of proof from the injured part to the injuring party. This further strengthen the position of the tug verses the tow. Other standardised contracts and conditions have similar clauses. The contract can also shift the liability in collision with third parties. However this will only affect the relationship between the tug and tow, and it cannot affect the relationship between the tug and third party. The reason for this is simply that between the tug or tow and the third party it exist no contract. Contractual relations will only be relevant in the event of a recourse claim. In the case between the third party and the tug or tow normal rules of collision must be used. In the Scandinavian standard conditions the tug owners' liability is also limited to NOK 100.000.

The tug owners or a tug owner associations publish most standardized towage contracts. This then make them rather one sided. BIMCO tried with Towcon and Towhire to create a more balanced standard contract. The solution in these contract is that each party bears the responsibility of death and injury to its own employees. Other liabilities are divided on "knock-to-knock" principle.⁸⁰ The basic rule is that each owner is responsible for its own vessel, and that they will indemnify each other for any liability towards third parties in accordance with their fault.⁸¹

⁷⁹ Scandinavian Tugowners Standard Conditions of the year 1959, revised 1974 and 1985

⁸⁰ BIMCO; p 74

⁸¹ Rainey, Simon; The Law of Tug and Tow; p 282

3.2.2 Contracts in the Coastguard

The Coastguard will often only use contractual conditions if weather conditions or similar suggest that the tow will be under increased risks, if the vessel has been stranded and is to be pulled off or if something suggests that the risks involved will be greater than normal. In all these situations the operation will often be inside the category of salvage. As seen above, can the salvor be better protected from liability claims than what a tug are. This then suggests that the need for protection against liability is greater in normal tug services than in salvage services. Because it can be of some difficulty to separate the two situations in the heat of the moment it can be wise to use some standard conditions in all tug operations. In some situations the use of standard conditions will be impossible or impractical, but it should be used when it is practical. The use of standard conditions can also protect the Coastguard against liability for pollution damage. See chapter 4 below for further discussion.

3.3 Towage and insurance

Liability arising out of towage can be covered by the NMIP. For ocean going ships it is covered in its hull insurance. § 13-1 gives that the insurer is liable for liability imposed by the tug. National maritime law of the relevant country then decides if the insured ship can be liable towards an oncoming ship were the collision is caused by fault on the tug's side.⁸² The NMC section 151 identifies the ship-owner with the tug, and thereby it can impose liability on the ship-owner for fault committed by the tug. If no relevant liability or recourse clauses are made between the tug and tow the insurer will have a recourse opportunity against the tug. The insurer will have the same possibility for recourse action against the tug-owner as the assured. Normally such liability or recourse clauses will exist and the insurer will recognize the liability in full.⁸³ There are some demands to these clauses put down in NMIP. The terms must be considered to be "customary to the trade" as

⁸² Whilhelmsen, Trine-Lise; Bull, Hans Jacob; Handbook on Hull Insurance; p 288

⁸³ Whilhelmsen, Trine-Lise; Bull, Hans Jacob; Handbook on Hull Insurance; p 288

put down in § 4-15 letter a) or it can not be “prohibited” by the insurer as of § 3-28 and § 4-15 letter b). If the collision is between the tug and the tow same rules applies. Still it is a need for the insured to become liable from the law or the contract.

4 Environmental damages

4.1 Environmental damage and clean up costs

In the aftermath of a marine accident, it will often be environmental damages or a treat of such damages. The clean up and preventive cost is as a starting point covered by the ship owner and the insurers. For larger damages the ship owners and the insures may limit their liability in accordance with NMC chapter 10 or chapter 9.

The NMC deals specifically with environmental damages in chapter ten. Oil spills from any floating construction designed or adopted to carry oil in bulk are dealt with in section 191 to section 209. These sections incorporate the CLC Convention 1992 into Norwegian Law. Oil spills caused by fuel oil, not covered by section 191-209 are covered by section 183 to section 190. These sections incorporate the Bunker Convention into Norwegian Law. Liabilities for pollution damaged covered by chapter ten are irrespective of fault.

The Bunker Convention was signed in 2001, and fills a gap in the legislation on oil pollution. NMC section 186 gives all Norwegian ships above 1000 tons a obligation to carry insurance for the minimum the amount that it may limit its liability to in accordance with section 175. This also applies to all foreign ships calling to, sailing from or loading or discharging from a Norwegian port.

The CLC convention 1992 relates to persistent oil that is carried as cargo in bulk. Persistent oil is defined in section 191 fourth subparagraph as persistent hydrocarbon-mineral oil, such as crude oil, fuel oil, heavy diesel oil and lubricating oil.

If the pollution is regulated under the Petroleum Act Chapter 7, will those rules apply. The limitation rules in NMC chapter 10 or chapter 9 will not be applicable. The Petroleum Act

chapter 7 gives strict liability to the licensee. The only overlap between the Petroleum Act and NMC is when a tanker is loading at a off shore installation.⁸⁴ The licensee will then be fully liable under Petroleum Act chapter 7, and the ship owner will be liable under chapter 10 of NMC.

Also other types of cargo may be a environmental threat. Now the most important kind of pollution no governed by other law is pollution from Hazardous and Noxious Substances (HNS). The HNS Convention is expected to be ratified by Norway. When this is done the major sources of pollution from ships will be governed by NMC. Any other environmental damage is as a starting point covered by section 151, and the owner are only liable when there is fault at the owner or his servants' side. This is, however, modified by chapter 8 of the Pollution Act. From § 53 it follows that for pollution not directly mentioned in the NMC chapter 8 of the Pollution act applies. This gives a strict liability for pollution damages for the owner of the property, object, plant or business. In other words to the ship owner. Also negligent or wilful acts that contribute to the pollution may lead to liability. It follows from the § 53 first subparagraph that the damage may be limited in accordance with NMC chapter 9. Examples of such environmental damage can be organic substances that will decompose, and become a environmental problem.

The provisions in chapter 8 in Pollution Act are applicable to damage that occur in Norwegian territory or in Norwegian Economical Zone (NEZ).⁸⁵ If the damage occurs outside the area above it also apply if the damage comes from an incident or business in Norwegian Territory or in NEZ. If Norwegian tort law is to be used the provisions in chapter 8 is also to be used.

The Coastguard has as any other the possibility to claim for damages in the aftermath of pollution damages. This claim may include all direct clean up costs. To what extent more

⁸⁴ Falkanger, Thor; Bull, Hans Jacob; Brautaset, Lasse; Scandinavian Maritime Law; p 209

⁸⁵ Pollution Act § 54 a)

administrative costs also may be included are uncertain. This was one of the questions the Swedish Court of Appeal addressed in the Tsesis-case.⁸⁶ When it was addressed if permanent oil pollution readiness can be calculated into the liability for the ship owner. A part of the claim from the Swedish State included salary to the personnel in the Swedish Coastguard and costs to the running of the vessels. This was accepted by the Court of Appeal as part of the costs included in the liability of the ship owner. The fact that these costs would have been there even if it were no accident was not found relevant. The important were that the state could have given the task of cleaning up to a private company, in which similar costs would have been included. Also was it important that if these cost were to be excluded, the rules in which include preventive measures would have been ineffective.

4.2 Environmental damage caused by the Coastguard

On some occasions the Coastguard may also cause the pollution. This pollution may originate from the Coastguard vessel itself, or from other vessels.

If the pollution is originated from the Coastguard vessel the damage is treated as a starting point in the same manner as pollution from none state vessels. The state as the owner may limit its liability in accordance with the rules in chapter 9. It may though of political reasons refrain from doing so. It can of course easily bring negative attention to the government when it limits its liability, and only partly pays the claim from for instance private persons. The potential pollution damage caused by coastguard vessels are also less than from many others, this is because the Coastguard uses marine diesel as fuel and not the more harmful heavy fuels. In case of oil pollution from the coastguard it will be bunker oil pollution.

Section 183 defines ship owner widely. It includes registered owner, the “reder”, the bareboat charterer, the managing owner, or others responsible for central functions relevant

⁸⁶ ND-1981-1 SCA

to the running of the ship. The persons who are recognised as ship owner are jointly and severally liable for the pollution damage. This is relevant for the Coastguard in case of the chartered coastguard vessels. The Coastguard, and thereby the State, may then be recognised as an owner and be several and jointly liable for the damage. The recognition can be that the Coastguard is the managing owner or responsible for central functions relevant to the running of the ship. What is meant with managing owner and central functions relevant to the running of the ship rather imprecise. It seems natural, since bare-boat charter is expressly mentioned, that the wording managing owner points to also others who takes over nautical management of the ship. As the Coastguard partly crews the ship and is responsible for part of the running of the ship, it seems natural the state may be recognised as owner. The liability may still be limited, but again may pressure from the media etc be strong to pay all losses in full.

Section 192 gives exceptions from liability. This section applies to both pollution governed by section 183 to 190 and to pollution governed by section 191 to 209.⁸⁷ Letter a) excepts the owner from liability when the damage was caused by an act of war or similar action in an armed conflict, civil war or insurrection and if the damage was caused by a natural phenomenon of an exceptional, inevitable and irresistible character. The last exception will not create any special consideration for the Coastguard. The first exception is of interest for the Coastguard as it might be the cause of the act of war of similar. The exception was put in the convention on demand from the insurers from London, and it is suggested that therefore is the terms in the exemption connected with those used in the insurance market.⁸⁸

The probability of war in the normal waters for coastguards operation is small. The Coastguard may however get involved in smaller war-like armed conflicts, but this is also an unlikely scenario. If then the Coastguard must use its arms, and this then either purposely or accidentally harms a vessel, the ship owner will not be liable. Of maybe more

⁸⁷ NMC section 184 and section 192

⁸⁸ Kinell, Ulf; Fartygsägarens strikta ansvar för oljeskada; p 27

practical importance is if this exception covers all use of arms from the Coastguard? In the case of the Coastguard use its arms to stop a vessel but it accidentally harms a ship in the vicinity. Is the ship's owner then free from liability? How if the fire of the arms were a part of an exercise? The wording in section 192 states that the damage must be caused by war or in an armed conflict etc. This suggests that military exercises do not free the owner from liability. However if the terms are used in the same way as in the Norwegian Marine Insurance Plan, then also the use of arms in military exercises would be included. It is however uncertain if this is the correct understanding, but the wording of the section suggests that it is only the use of arms in the more "real" sense that is included. It is possible that there is a recourse opportunity in those cases.⁸⁹

In the case of usage of arms to stop a vessel, one must examine the situation when the shots were fired. If this situation can be categorized as a war, armed conflict or insurrection it will be no liability. When the Coastguard stops vessels for fishery crimes or similar this will not qualify as one of the above. It can also be relevant to identify with which authority the Coastguard fires the shot. If it is with its police authority granted by the Coastguard Act it seems to be further away from the exemption, than if it has fired as a military vessel. It seems from the wording that in case of fishery related use of arms it will not exempt the ship owner from liability.

The word insurrection do suggest that if an environmental protest which goes violent and if the Coastguard must use force to stop the protest any causal damage is included in the exemption. The violent protest must be of such a nature that it can be called an insurrection, though this seems like a unlikely scenario. In case of exceptions in letter a) it is no demand that the loss was entirely caused by an act of war etc. It is enough that the main reason is mentioned. A secondary contributing factor will not disqualify from the exemption of liability.

⁸⁹ See 4.2 below

Section 192 c) excepts the owner from liability when the damage is entirely caused by negligence or wrongful act by a public authority in connection with the maintenance of lights or other navigational aids. The word entirely suggests that there can be no other contributing factors to the damage. If there are several contributing causes the owner will be liable in full. This also applies if the main cause is errors in lights or the like. The Swedish Supreme Court made it clear that navigational aids includes navigational charts in *Tsesis-judgement*⁹⁰, and that it does not include pilot services in *José Marti-judgement*⁹¹. Maintenance of lights also gives some issues in deciding where it is negligence. For example will often lights be unlit, and how long can this be unlit before it is negligently not to report it in a navigational warning? What if it is failed to be reported? How about ice on the glasses at winter that leads to green sectors looking white? The case ND-1970-82 *Tirranna* gives some guidance. In this case the vessel *Tirranna* had grounded. The owner claimed it was due to a red light buoy was unlit, and that was due to the negligence of the light's keeper. The owner claimed for damages from the state. The Supreme Court held that a unlit light is within what must be within what to be expected, and that the ship's management had put too much faith in the function of the light. The fact that the light was unlit due to human error, and not technical malfunction, could not be of importance. The judgement does not involve strict liability for oil damages, but it is important that the unlit light is within what may be expected. Although an unlit light may contribute to the loss, will also the fact that the ship was not prepared for this be negligent. The loss will then not be entirely caused by the unlit light, and the owner is not exempted from liability. It is only major deviations that will involve liability⁹², and this then suggest that only major deviations may free from strict liability. The exemption of liability in letter c has been attempted removed from the convention, but it has not been successful.⁹³ The reason for this attempt is that the risks of these errors are both foreseeable and insurable.

⁹⁰ ND-1983-1 SSC

⁹¹ ND-1987-64 SCA

⁹² Selvig, Erling; *Kommentar i Nordiske Domme* 1983; p VII

⁹³ Wetterstein, Petter; *Redarens Miljöskadeansvar*; p 81

Seconds subparagraph gives that if the injured party deliberately or negligently contributes to the damage, the liability may be abated in accordance with general rules of liability. This arise the question if the Coastguard as a contributor can be identified with the state as an injured party? The answer to this must be positive it can be identification. This will affect the Coastguard if it directly contributes to the damage, but also if it negligently fails to limit the damage. If for instance the situation has been misunderstood, and this leads to a too small response to the oil spill. Then the Coastguard might have negligently failed to limit the oil spill, and this will then lead to for the ship owner to abate his liability. The general rules referred to is codified in the tort act § 5-1. It is clear that all form of blameworthy behaviour can qualify as a contribution and that also an omission to act can lead to abated liability. It follows from the preparatory works that in case of strict liability, that the liable parts degree of fault is relevant.⁹⁴ If the strict liable also have acted negligently must this be given considerable weight in the injured parts favour.

The Swedish Supreme Court got the question of state contribution in the case ND-1984-8 M/T Sirocco. Sirocco entered the harbour area to discharge oil. It was then a suspicion that the Vessel grounded and sprung leak. That is why the crew checked the volume of oil in the tanks, but all the oil was there. Sirocco started the discharge of the oil after this. At the beginning no oil leaked out, but as the discharge of oil progressed the vessels draft became less. This then caused bunker oil to flow out of a crack in the hull. The owner and its insurer claimed that the harbour's owner had negligently contributed to the loss by not taking the appropriate cautionary steps. Among other was it the claimed that the harbour authorities should not approved Sirocco for discharge at such an early time, it should have provided for oil protection gear and it should have provided for light so the oil could have been seen. The Supreme Court did not agree with the ship owner, and did not find that the harbour's owner had negligently contributed to the loss.

⁹⁴ Ot.prp.nr 74 (1983-1984); Til §5-1

The issue of contribution was discussed in the Tsesis-case.⁹⁵ This case is about a Russian tanker that grounded in the fall of 1977 outside Stockholm. About 600 tons oil leaked out. Tsesis had grounded on an underwater reef, which the public navigational chart authorities had known about. The reef had been discovered during a survey in 1969, but was at that point believed to be close to but outside the sea route. The survey leader therefore did not report the reef, and no chart correction was issued. In the question of if the error of the chart authorities qualified to exemption of liability did the Court of Appeal answer no, but the Supreme Court answered yes. The Supreme Court's view then made it unnecessary to further review the judgement in the Court of Appeal, and the Court of Appeal's reasoning on several issues has then been the only Scandinavian court ruling on those issues. The Swedish Court of Appeal did find that the state by negligently not reporting of the underwater reef the state did contribute to the damage. The Court found the States claim should be abated due to this contribution.

The Coastguard may contribute to pollution damage from other vessels. The Coastguard Vessel may be fully or partly to blame for this damage. If the damage is from oil pollution the owner is objectively liable for the damage. If the Coastguard has negligently contributed to the damage the claim from the state may be abated. It can be an aggravating circumstance if this negligence involves the use of public authority or the use of arms. Especially in the use of arms the degree of caution should be high and it should no tolerance for errors.

Section 193 gives the rules concerning channelling of liability in case of oil pollution covered by CLC convention and the bunker convention.⁹⁶ Second subparagraph a) to f) specifically mentions whom may not be subject to claims for compensation, unless they have caused the damage intentionally or through gross negligence with the knowledge that such damage would probably result. For the Coastguard is letter b) and d) relevant. Letter

⁹⁵ ND-1981-1 SCA

⁹⁶ NMC section 185 second sentence and section 193

b) includes anyone whom performs services for the ship. This wording will also include tug services and the like. Letter d) is relevant when the Coastguard is involved in salvage operations. The salvage operation must be with the consent of the ship or on instructions of public authority, but this demand will be fulfilled in most salvage scenarios. If the Coastguard is in a situation mentioned above no recourse actions can be done against the coastguard. With the exception of when the damaged is caused with intent or through gross negligence with the knowledge that such damage would probably result.

Gross negligence with the knowledge that such damage would probably result is an negligence that borders up intentional act. The damage must be a probable consequence of the act, and the persons must have knowledge of this. Intentionally caused damage may occur at times, but it must be considered rear.

In some situations the Coastguard may also contractually protect itself from pollution liability. Especially before certain risky operation may the Coastguard sign off liability for the consequences. It is also possible to agree that it shall be no recourse in accordance with section 192 or 193. The same opportunity exists if the pollution is governed by the Pollution Act. It is only in some situations were contract can be made. The major situations are salvage and towage operations.

In the Tsesis-case it also were the question of if the cost of salve the vessel should be compensated as a salvage award or a preventive measure. The Court then found that in that case should be treated as a preventive measure. This is no longer valid law. With the change of the Salvage Convention to include environmental salvage and special compensation it now should be compensated as a salvage award. This is relevant as the ship owner is prevented from limiting salvage awards and special compensations.

5 Limitation of liability

The Coastguard may limit its liability in accordance with NMC chapter 9. Section 181 gives that in case of warships the tonnage shall not be set lower than 5.000 tons. In the Coastguard NoCGV Svalbard is larger than 5.000 tons, with the size of 6.375 tons.⁹⁷ To the comparison the second largest vessels are the three vessels in Nordkapp-class, which is approximately 3.000 tons. The limitation of a Nordkapp-class vessel would then be set to 5.000 tons. This then will also apply to smaller coastguard vessels. For the chartered coastguard vessels this create some problems. Is it considered a state vessel or a private owned vessel? The section 181 first subparagraph does not apply to vessels mainly used for salvage or ice-breaking. The only ship this might be used for is the ice-breaker NOCGV Svalbard. This vessel is too large and that special rule will not be of importance to the Coastguard with the current vessels.

Then, after section 175, the limitation for the 5.000 tons will be for personal injury $(2.000.000 \text{ SDR} + 3000 \times 800 \text{ SDR}) = 4.400.000 \text{ SDR}$. For other damages and what left from the personal injury claim it is $(1.000.000 \text{ SDR} + 3000 \times 400) = 2.200.000 \text{ SDR}$. With one SDR is equal to NOK 9.34⁹⁸ it gives a limitation on NOK 41,1 millions for personal injury and NOK 20,55 millions for other damages.

Section 172a gives the limitation for clean-up efforts relating to maritime accidents. Number 2) only concerns cargo, and will not affect the Coastguard. Number 1) will affect the Coastguard if the damage is caused by the vessel being sunk, stranded, abandoned or wrecked. If this is the case then costs in connection with clean-up efforts will be limited

⁹⁷ www.mil.no/sjo/kv/

⁹⁸ Per 2009-08-21; Source: International Monetary Fund

under section 175a. The limitation amount for 5.000 tons will then be $(2.000.000 \text{ SDR} + 3.000 \times 2.000) = 8.000.000 \text{ SDR}$. Which is approximately NOK 74,72 millions.

6 Conclusions

Salvage, towage and environmental damage operations create special legal perspectives and considerations. Many of these considerations will be of apply to all kinds of vessel. When the Coastguard performs salvage, towage or environmental damage operations some special considerations are relevant. Towage and environmental damage operations will often be a part of a salvage operation, and the rules involved may be the same. Some rules are though special to towage and environmental damage operations, and on occasions will those operations be outside the category of salvage.

There some considerations on salvage that is special to the Coastguard. These will for a large part concern obtaining the award and the distribution of the award. There is, however, nothing the in the legal that prevent the Coastguard from obtaining a salvage award. When the Coastguard anyhow does not claim for salvage awards, is this of their own choice. It can be argued that this choice is a weakening of the principle of salvage. Ship-owners might refuse help if they can wait for free coastguard assistance. The coastguard does try to avoid this by only offer assistance in immediate distress or if no commercial alternative exists.

When the Coastguard performs towage it will to some extent be on its own in not using a contract. This will put the Coastguard in a weaker position in the case of a liability claim than is necessary. It is understandable that it is unpractical in certain stressful situations to deal with contractual terms. This should however not discourage the Coastguard from using towage conditions when it is possible.

Environmental damage operations are performed by the Coastguard on several different occasions. The ship owner is strict liable for oil pollution damage in accordance with NMC chapter 10. This applies to both bunker oil pollution and pollution from oil carried as cargo.

The oil damage may originate from a Coastguard vessel. Then the State as the owner will be liable for the damages. The Coastguard may also contribute to the damage. Then the Coastguard will be identified with the Norwegian State as its owner. The State's claim may then be abated.

In case of liability for the Coastguard may it be limited according the rules in NMC chapter 9.

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